JUDGE JIM ROGERS
Hearing Date: May 23, 2008, 1:30 P.M.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

LUMMI NATION, et al.,

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants,

JOAN BURLINGAME, et al.

Plaintiffs,

v.

STATE OF WASHINGTON, et al.,

Defendants,

and

WASHINGTON WATER UTILITIES COUNCIL, et al.,

Intervenors.

No. 06-2-40103-4 SEA

DEFENDANT-INTERVENOR WASHINGTON WATER UTILITY COUNCIL'S REPLY TO PLAINTIFF TRIBES' AND BURLINGAME PLAINTIFFS' MEMORANDA IN RESPONSE TO WWUC'S MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

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Statutes

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I. INTRODUCTION.

Defendant-Intervenor Washington Water Utilities Council ("WWUC") files this reply ("WWUC's Reply") to the response of Joan Burlingame, et al., ("Burlingame Plaintiffs") and Lummi Nation, et al. ("Plaintiff Tribes") to Defendants' Motions for Summary Judgment ("Burlingame Plaintiffs' Response" and "Plaintiff Tribes' Response," respectively).[1] As described below, the Court should grant WWUC's Motion for Summary Judgment[2] ("WWUC's Motion") and deny Plaintiffs' Motions for Summary Judgment.

II. SUMMARY OF ARGUMENTS.

With the Municipal Water Law ("MWL"), the Legislature balanced the need to provide reliable safe water supply to the state's growing population with the competing need to conserve limited water resources. As is increasingly clear from Plaintiffs' Responses, Plaintiffs do not agree with the Legislature's approach. Having been unable to persuade the Legislature of their preferred policy objective, Plaintiffs have turned to the court and seek to strike down the statute on its face and in its entirety. However, Plaintiffs' disagreement with the balanced policy judgment of the Legislature does not support their claims that the statute is unconstitutional.

Plaintiffs' Responses demonstrate the deficiencies underlying their constitutional claims. As was indicated in WWUC's Response and WWUC's Motion, Plaintiffs' claims are based solely on speculative allegations of harm, including reliance on dubious "as-

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[1] WWUC has filed a separate reply to the State's Memorandum in Response to WWUC's Motion in which WWUC addresses the State's "active compliance" interpretation, the sole point of disagreement between the State and WWUC.

[2] To avoid repetition, WWUC incorporates the arguments from its Motion and Response to Plaintiffs' Motions for Summary Judgment ("WWUC's Response"). Based on a review of preliminary drafts, WWUC also incorporates the State's Memoranda in Rebuttal to Burlingame Plaintiffs and Plaintiff Tribes with the exception of the State's arguments requiring "active compliance" with the definition of municipal water supply purposes. WWUC does not repeat any arguments incorporated from those briefs.

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applied" fact patterns that are inappropriate in the context of a facial challenge. Even if Plaintiffs' as-applied evidence is admissible, it is unreliable and discredited. *See* Declaration of Joseph Becker, Robert Hunter, Jim Miller, Bradley Lake, and Jay Cook.

More broadly, Plaintiffs' claims are based on their subjective interpretation of prior statutes and case law. Rather than acknowledging uncertainty or ambiguity that existed prior to the MWL, Plaintiffs presume their subjective interpretation of past law as the benchmark against which they measure the MWL. However, Plaintiffs have no vested right in the mere expectancy that the Legislature should adopt their interpretation of ambiguous law.

To support their challenges, Plaintiffs continue to misconstrue the challenged provisions of the MWL. Plaintiffs' characterization is not supported by the plain meaning of the challenged provisions, including a review of the statute as a whole. Plaintiffs ask the Court to adopt their strained construction of the statute. Plaintiffs' approach flies in the face of statutory construction which requires the court to construe a statute so as to uphold its constitutionality.

Additionally, Plaintiffs ask this court to abandon principles of statutory construction that require the Court to look to the statute as whole to determine the meaning of the statute. Instead, Plaintiffs isolate the challenged provisions of the MWL designed to provide certainty and flexibility in the administration of municipal water rights while completely ignoring the MWL's countervailing provisions designed to promote conservation and efficiency in the exercise of those municipal water rights. Plaintiffs' targeted and out of context approach to statutory construction distorts the statute and leads to absurd interpretations and allegations of impact. Accordingly, and as demonstrated in further detail below, the Court must reject Plaintiffs' facial constitutional challenges.

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III. PLAINTIFFS' SUBSTANTIVE DUE PROCESS AND SEPARATION OF POWERS CLAIMS ARE BASED ON THEIR ERRONEOUS AND SUBJECTIVE INTERPRETATION OF THE LAW AS IT EXISTED PRIOR TO HE ADOPTION OF THE MWL.

Plaintiffs offer a one-sided and strained interpretation of the law as it existed prior to the MWL, reading out of the law any uncertainty or ambiguity to paint a picture of clarity. Similarly, Plaintiffs interpret case law prior to the MWL to include broad proclamations and holdings that do not follow from the plain language of the decision. Plaintiffs then argue that the MWL fundamentally changed that allegedly clear and concise body of law retroactively such that it violates the constitution. This erroneous interpretation of the law as it existed prior to the MWL is fundamental to Plaintiffs' substantive due process and separation of powers claims.

The Court must reject Plaintiffs' interpretations of past law. Contrary to their characterization, the law was not clear and case law did not resolve issues that are the subject of the MWL. As seen in the examples in the following subsections, Plaintiffs present one interpretation of previously ambiguous law. Plaintiffs have no vested right in the expectation that their subjective interpretation of the law should have prevailed in the Legislature. To the contrary, the Legislature has broad authority to cure historic ambiguities. Plaintiffs are asking this Court to exercise a disfavored remedy and constrain significantly the Legislature's power to address ambiguity and uncertainty in the law and to change the law prospectively. Plaintiffs did not persuade the Legislature to adopt their restrictive approach. They should not now be allowed to pursue their legislative remedy in court.

Accordingly, the Court must reject Plaintiffs' interpretations of past law which provide the foundation of their separation of powers and substantive due process challenges. Without this foundation, Plaintiffs' challenges fail.

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A. Plaintiffs' Interpretation of *Theodoratus* (Upon Which Their Separation of Powers and Substantive Due Process Arguments Are Based) Is Overly Broad and Inconsistent with the Language of the Decision.

Plaintiffs' separation of powers and substantive due process challenges fail because they are based on an erroneous interpretation of the Supreme Court's decision in *Dep't. of Ecology v. Theodoratus,* 135 Wn.2d 582, 957 P.2d 1241 (1998). Specifically, Plaintiffs ask this court to presume that the Court in *Theodoratus*: (1) resolved the question of which entities qualify for the exemption from relinquishment for municipal water supply purposes; and (2) invalidated all certificates that Ecology had previously issued on the basis of system capacity rather than on actual beneficial use. *See, e.g.,* Burlingame Plaintiffs' Response at 12-13. As already noted in the State's Motion at 16-22 and WWUC's Response at 14-18, Plaintiffs' interpretation is inconsistent with the plain language of the case and would yield absurd results. While *Theodoratus* left uncertainty in its wake as to how it could be extrapolated in other contexts, the holding was much more narrow than the Plaintiffs assume. The Court in *Theodoratus* did not directly address issues that are the subject of the MWL. The Legislature's efforts to address the uncertainty left in the wake of that decision are consistent with the Court's decision and do not contravene the Court's decision.

For example, Plaintiffs misconstrue the Court's holding in *Theodoratus* when they suggest that the case resolved the question of which entities qualify for the exemption for municipal water supply purposes.[3] *See* Burlingame Plaintiffs' Response at p. 13, lines 9-14, and Plaintiff Tribes' Response at p. 19, lines 23-26. The Court in *Theodoratus* did not interpret the exemption for municipal water supply purposes or otherwise interpret the phrase "municipal water supply purposes." To the contrary, the Court expressly declined

[3] As described in further detail in section C, below, the term municipal water supply purposes was ambiguous and undefined until the MWL, which cured the historic ambiguity.

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to "address issues concerning municipal water suppliers in the context of this case." *Theodoratus,* 135 Wn.2d at 594. Plaintiffs nevertheless argue that this phrase coupled with the statement that the appellant in that case (a privately-owned community water system) was "not a municipality" suggests that developers like the appellant in *Theodoratus* do not qualify for the exemption for municipal water supply purposes. However, the Plaintiffs' interpretation stretches the Court's decision to illogical extremes. First the Plaintiffs' interpretation renders meaningless the Court's express decision to decline to address issues related to municipal water suppliers. Second, even if the Court accepts Plaintiffs' strained interpretation, the text upon which the reply is clearly *dicta* because it is well beyond any of the issues presented to the Court and was completely unnecessary for the court to reach its decision. *See* Declaration of Alan Reichman dated March 18, 2008. The Court in *Theodoratus* was addressing perfection of a *permit. Id.* at 587-588. Relinquishment only applies to perfected water rights, not permits.[4] RCW 90.14.150. *See also Public Utility Dist. No. 1 of Pend Oreille County v. Dept. of Ecology,* 146 Wn.2d 778, 803, 51 P.3d 744 (2002) ("[T]he Legislature has plainly made statutory forfeiture [under ch. 90.14 RCW] inapplicable to unperfected water rights"). Accordingly, questions related to relinquishment and exemptions from relinquishment are well beyond the issues that were before the court.[5]

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[4] Until a water right is perfected through actual beneficial use, it is "inchoate" meaning that the holder of the water right can continue to develop the water right to the allowed quantities and uses provided that reasonable diligence is exercised. *See* RCW 90.03.320. Once perfected through beneficial use, the state issues a certificate, and the water right is subject to relinquishment for nonuse pursuant to ch. 90.14 RCW. It would be contrary to RCW 90.03.320, which was not amended by the MWL, to interpret *Theodoratus* as holding that relinquishment could apply to water rights in permit status.

[5] If the Court accepts Plaintiffs' interpretation of quoted passages in *Theodoratus,* then the Supreme Court's discussion of the exemption for municipal water supply purposes is not unlike the court of appeals' discussion in *Sheep Mountain Cattle Co. v. Dep't of Ecology,* 45 Wash.App. 427, 726 P.2d 55 (1986), *rev. denied,* 107 Wn2d 1036 (1987), of the "determined future development" exemption. *Sheep Mountain* presented the question of whether the challenging party had been afforded due process prior to

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Similarly, Plaintiffs erroneously characterize the impact of the Court's holding in *Theodoratus* regarding pumps and pipes certificates. According to Plaintiffs, *Theodoratus* determined that certificates issued on the basis of system capacity are invalid and had returned to permit status. *See* Burlingame Plaintiffs' Motion at 23. The Court's holding does not support such an interpretation. The Court in *Theodoratus* addressed the validity of a condition placed on a *permit* and the Court determined that water rights become perfected (from permit to certificate) upon actual beneficial use. 135 Wn.2d at 590. To the extent that the appellant in *Theodoratus* claimed a right to perfection based on system capacity,[6] the Court held that Ecology could not issue a certificate based on system capacity alone. *Id.* The Court therefore upheld Ecology's proposed condition requiring actual beneficial use prior to perfection. The MWL is consistent with this holding. *See* RCW 90.03.330(4). However, in a case addressing the manner in which a *permit* could be perfected, the Court did not address the validity of the multitude of existing pumps and pipes *certificates* that had *already* been issued to public water systems. Nor could it, within the confines of the case and controversy presented for review. Such an expansive holding would have impacted the status of thousands of certificates held by entities that were not before the court and over which the Court had no jurisdiction in that case. Had the Supreme Court intended to declare a sweeping ruling with such drastic consequences,

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relinquishment. The court in *Sheep Mountain* nevertheless discussed whether the determined future development exception was applicable. As noted by the Supreme Court, because it was beyond the scope of the issues presented to the court of appeals, the court of appeals' "discussion of whether the determined future development exception might apply was dicta." *R.D. Merrill Co. v. PCHB*, 137 Wn.2d 118, 145, 969 P.2d 458 (1999). Similarly, in this case, even if the Court accepts Plaintiffs' characterization of the *Theodoratus* decision, the Court must nevertheless conclude that the discussion in the *Theodoratus* is dicta and not binding.

[6] The original conditions imposed on the permit indicated that perfection would be complete upon construction of a water distribution system sufficient to supply the allocated quantity of water. 135 Wn.2d at 592. The water system filed the appeal to challenge Ecology's efforts to replace the condition with a new condition indicating that perfection would be upon actual beneficial use and not upon system capacity. *Id.* at 588. The Court upheld that condition.

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it would have said so directly. This Court should reject Plaintiffs' interpretation of *Theodoratus*.

B. Plaintiffs' Retroactive Characterization of the Definitions Is Based On Plaintiffs' Misinterpretation of the Operation of the Relinquishment Statute.

Plaintiffs' challenges to RCW 90.03.015(3)-(4), the "Definitions," are also dependent on a flawed characterization of the legal operation and timing of relinquishment. Plaintiffs' characterization is based on a strained interpretation of isolated portions of the relinquishment statute and ignores the preeminent case law interpreting the relinquishment statute.

As noted by the state Supreme Court, "relinquishment is complex." *Dep't. of Ecology v. Acquavella*, 131 Wn.2d 746, 757, 935 P.2d 595 (1997). Relinquishment of water rights is governed by statute. *See* RCW 90.14.130 - .180. According to the statute, voluntary failure to use a water right, in whole or in part, for five or more successive years, results in relinquishment of the right, in whole or in part. *Id.* However, there are numerous exemptions from relinquishment. RCW 90.14.140. A party subject to a relinquishment order has the opportunity to show how its nonuse falls under one of the exceptions. RCW 90.14.130, 140. The issue of whether an exception excuses non-use or shows sufficient cause is "a question of fact that is relevant only at the time one asserts relinquishment." *Acquavella,* 131 Wn.2d at 760-61 (analyzing whether exception for "standby and reserve" applies to excuse non use).

As demonstrated in WWUC's Motion at 22-28, relinquishment under Washington law does not occur until Ecology issues a determination and the water right holder has an opportunity to show sufficient cause by appealing to the PCHB or until a court reaches a determination in the context of an adjudication. *Motley-Motley, Inc. v. State of Washington,* 127 Wn. App. 62, 78-80, 110 P.3d 812 (2005) (("[t]he relinquishment of

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Motley's water right did not become effective until PCHB held a hearing and then issued its findings, conclusions, and order"); *Sheep Mountain Cattle Co. v. State*, 45 Wn. App. 427, 726 P.2d 55 (1986). Accordingly, for purposes of determining whether the Definitions are prospective or retroactive when applied in the relinquishment context, the "precipitating event" is the Ecology, court, or PCHB determination in which the Definitions are applied. Because the Definitions only apply to Ecology, court or PCHB determinations that occur after the adoption of the MWL, the Definitions are prospective only, even when Ecology, courts or the PCHB consider evidence that predates the adoption of the MWL.[7]

Plaintiffs argue that RCW 90.14.160 implies that relinquishment occurs by operation of law because the statutory language indicates that a water right holder who fails to use a water right in whole or in part for five consecutive years "shall relinquish" the water right and the right "shall revert to the state." *See* Plaintiff Tribes' Response at 23. Plaintiff Tribes also point to portions of RCW 90.14.130 that refer to the occurrence

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[7] Burlingame Plaintiffs cite to *Merrill*, 137 Wn.2d 118, and *Merritt v. Dep't. of Ecology*, PCHB No. 98-140, 1999 WL 160235 (1999) in support of their argument that relinquishment occurs earlier, by operation of law prior to Ecology's determination. Burlingame Plaintiffs' Response at 19-20. Burlingame Plaintiffs' citation to these cases is misplaced. In the *Merrill* the Court confirms that Ecology "must address" issues of relinquishment or abandonment when considering a change application under RCW 90.03.380. 137 Wn.2d at 126, 127. Nothing in *Merrill* changes the court's conclusion in *Sheep Mountain* that relinquishment cannot occur until an adjudicative determination providing an opportunity to be heard. Whether in context of a change application, an adjudication, or an order of relinquishment, there is an adjudicative action required before a certificate can be relinquished. Burlingame Plaintiffs fail to reconcile their argument with the Court's decision in *Sheep Mountain*. Similarly, the PCHB's decision in *Merritt*, 1999 WL 160235, is inapposite. In the passage cited by Plaintiffs, the PCHB indicates that a person acquiring a water right with a history of non-use cannot escape Ecology's order of relinquishment merely because a prior owner was responsible for the non-use. *Id.* at *5. The PCHB's decision confirms the scope of evidence of nonuse that may be considered. It does not address the issue of *when* relinquishment, itself, occurs. If anything, *Merritt* provides an example of the timing of relinquishment. Ecology issued an "Order *to Initiate* Relinquishment," *id.* at *6 (emphasis added) applying the history of non-use to the relinquishment statute and reaching its conclusion. The Order was appealed and the PCHB affirmed Ecology's Order at which time relinquishment occurred based on evidence of past non-use. Neither *Merrill* nor *Merritt* changes the courts' analysis in *Sheep Mountain* or *Motley-Motley* and the conclusion that relinquishment occurs upon an adjudicative action and not at the time of non-use.

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of relinquishment in the past tense, suggesting, by implication, that relinquishment and reversion occurs by operation of law.

However, in their analysis, Plaintiffs ignore *Sheep Mountain* and *Motley-Motley*. Plaintiffs also ignore language in RCW 90.14.130 which indicates that relinquishment occurs after an Ecology order and opportunity for appeal to the PCHB, consistent with *Sheep Mountain* and *Motley-Motley*. Pursuant to that subsection, "[w]hen it appears to the department of ecology" that a person has not used the water right for five consecutive years or more, Ecology issues an order:

> The Order shall contain:...
>
> > (2) a statement that unless sufficient cause be shown on appeal the water right *will be declared relinquished*; and (3) a statement that such order may be appealed to the pollution control hearings board. Any person aggrieved by such an order may appeal it to the pollution control hearings board pursuant to RCW 43.21B.310. The order shall be served by registered or certified mail to the last known address of the person and be posted at the point of division or withdrawal. *The order by itself shall not alter the recipient's right to use water*, if any.

RCW 90.14.130 (emphasis added). These provisions require opportunity for appeal of Ecology's order before a right is relinquished. Therefore, relinquishment does not occur by operation of law. Indeed, the final sentence indicates that the Ecology order has no independent effect. The Legislature adopted the final sentence after the *Sheep Mountain* decision, Laws of 1987, c 109 § 13, thereby codifying the *Sheep Mountain* decision and bolstering the conclusion that relinquishment occurs only after Ecology order and opportunity for appeal. Therefore, the Court should not focus solely on portions of RCW 90.14.160 and .130, out-of-context, but should look to the relinquishment statute as a whole and to the case law interpreting those provisions. When viewed in that light, it is clear that the precipitating event is not, as Plaintiffs suggest, the occurrence of the non-

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use. Rather it is the adjudicative determination of relinquishment, regardless of the date of the non-use.

Similarly, the Court should reject Plaintiff Tribes' reliance on an Assistant Attorney General's memorandum dated January 24, 1977 which was forwarded to Ecology staff on September 13, 1983. *See* Second Declaration of John Arum, dated March 24, 2008, Ex. 29. The memorandum takes the position that relinquishment occurs by operation of law. *Id.* However, the memorandum and legal opinion preceded *Sheep Mountain* and the legislative amendments. Notably, since *Sheep Mountain* and since the Legislature amended the relinquishment statute to further confirm the courts' interpretation, the Attorney General's office revised its opinion. Specifically, the division of the Attorney General's office representing Ecology determined in 1990 that:

> the Code requires Ecology to provide notice to the person whose water right may be relinquished and *until that person has an opportunity to show sufficient cause by appealling [*sic.*] to the PCHB, his water right is not relinquished.* If the person fails to timely appeal an order of relinquishment to the PCHB the order will stand as a relinquishment of that person's water right.

Declaration of Thomas McDonald, Att. A at 1-2 (emphasis added).

Finally, Plaintiffs also seek to support their interpretation that relinquishment occurs by operation of law by arguing that the hearing required prior to relinquishment is not a precipitating event, but "serves merely as the procedural mechanism whereby a water right holder can contest a State determination that the right had previously been relinquished." Tribes' Response at 25. The Court should reject Plaintiffs' characterization. It eviscerates the court's holdings in *Motley-Motley* and *Sheep Mountain*, ignores the 1987 amendment to RCW 90.14.130, and reduces the required substantive and procedural due process protections to a mere formality.

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C. Plaintiffs Mischaracterize the Historic Ambiguity of the Term Municipal Water Supply Purposes.

In their motions for summary judgment, WWUC and the State describe the ambiguity of the term "municipal water supply purposes" and Ecology's resulting inconsistent implementation of that term. In this context, the Definitions are clearly curative of an ambiguous undefined statutory term. Plaintiffs nevertheless contest the curative nature of the Definitions by attacking the evidence of the historic ambiguity of those terms and by proposing limited interpretations of the term. As described below, Plaintiffs' responses are without merit. The term was ambiguous prior to the MWL.

A provision is ambiguous " if it can be reasonably interpreted in more than one way." *Yousoufian v. Office of King County Executive*, 152 Wash.2d 421, 433, 98 P.3d 463 (2004). Prior to the adoption of the MWL in 2003, the phrase municipal water supply purposes only appeared in the relinquishment exemption at RCW 90.14.140(2)(d), and the phrase was not defined in chapter 90.14 RCW or elsewhere in the code. The term "municipal water supply purposes" was ambiguous because, in the absence of a definition, the phrase can suggest one of two applications. Either the applicability of the phrase is limited to particular legal *entities* (e.g., a municipality) or the phrase focuses on the *function* served by the exercise of the water right, regardless of the legal structure, as is suggested by the second half of the phrase (municipal water supply *purposes*). Because of this ambiguity which was not resolved until the adoption of the MWL, Ecology, an agency charged with implementation of the relinquishment statute, applied the term inconsistently, at times suggesting that the phrase is limited to certain legal entities, and at other times focusing on the function served by the entities. *See* WWUC's Motion at 11-13. The uncontroverted evidence of inconsistent interpretation and application confirms that the term can reasonably be interpreted in more than one way such that it is

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ambiguous. Even the legislative history of the MWL acknowledges the historic ambiguity of the law preceding the MWL. *See* Declaration of Bill Clarke, Ex. A (fiscal note memorandum states that MWL would clarify and resolve a number of ambiguities).

Plaintiffs challenge the historic ambiguity of the term by characterizing the evidence of inconsistent implementation as evidence of "random acts of individual [Ecology] employees." Plaintiff Tribes Brief at 20. Plaintiffs' characterization is without merit. The evidence includes certificates and permits issued over the span of decades to a variety of legal entities. *See* WWUC's Motion at 12, n.5. Additionally, the evidence included opinions of a program manager of the water resources program of the Department of Ecology and the deputy director of Ecology, not just random "individual employees."[8] Accordingly, the State and WWUC have presented uncontroverted evidence of competing interpretations, examples of which span decades and are issued by people from various levels of authority that demonstrate a pattern of inconsistent application that occurred as a direct result of the ambiguity in the undefined term. Plaintiffs ask this Court to ignore the evidence supporting a broader interpretation of the term Municipal water supply purposes. There is no support for Plaintiffs' selective presentation of evidence.

To support their position, Plaintiffs argue that, where a term is undefined, the court must first use the dictionary definition. *See* Plaintiff Tribe's Response at 19 (citing *In re Pepperling,* 65 Wn. App. 17, 21, 827 P.2d 347 (1992). Plaintiffs focus solely on the dictionary definition of "municipal" and suggest that it includes only local governments.

[8] *See* Declaration of Thomas D. Mortimer dated Jan. 31, 2008, Ex. E (Program Manager of the water resources program indicates that "[t]he law is clear to us about treatment of applications for municipal use. Water districts are treated co-equally with other applicants, permit holders, and water rights holders as purveyors of water for municipal use."); Declaration of John Kounts, dated Jan. 30, 2008, Ex. D (Deputy Director indicates that "Ecology may apply the "municipal water supply purposes" exemption of the relinquishment statute to water rights held by municipalities as well as other entities, including PUDs and water districts."). *See also* Declaration of Ken Slattery dated Jan. 16, 2008, ¶ 9, Ex. 5.

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See Plaintiff Tribes' Response at 19. There are several problems with Plaintiffs' interpretation. First, the dictionary definitions of the adjective "municipal" also relate to the function served by the entity. For example, Black's Law Dictionary (6th Ed. 1990), acknowledges both a "narrower" and a "broader" meaning of the term "municipal." In its "broader sense, [municipal] means *pertaining to the public* or governmental *affairs* of a state or nation *or of a people*." Thus the broader definition is not based on the legal nature of the acting entity, but instead focuses on the function served, regardless of the nature of the entity. Similarly, Merriam-Websters Collegiate Dictionary (11th Ed. 2005) defines "municipal" to mean "of, relating to, or characteristic of a municipality [.]" The definitions upon which Plaintiffs rely similarly indicate that the adjective "municipal" is "relating" to the city town or local governmental unit. Thus, in the adjective form, the term municipal also describes the *function* or *purpose* of the activity, rather than the limited meaning Plaintiffs ascribe to it.

Second, even if the Court accepts a more limited interpretation of the dictionary definition of the single term "municipal," the Court should still reach the conclusion that the entire phrase "municipal water supply purposes" is ambiguous. When using a dictionary definition, "a court should not apply a mechanical definition but rather should interpret the meaning of terms *in the context of the statute as a whole* and consistently with the intent of the Legislature." *One Pacific Towers Homeowners Assoc. v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 330, 61 P.3d 1094 (2002) (emphasis added). This principal of statutory interpretation is reflected in the doctrine of *noscitur a sociis* "which provides that a single word in a statute should not be read in isolation and that the meaning of the words may be indicated or controlled by those with which they are associated." *State of Washington v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005). *See also Shurgard Mini-Storage of Tumwater v. Dep't of Revenue,* 40 Wn.App.

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721, 727, 700 P.2d 1176 (1985) (the rule of *noscitur* a *sociis*... teaches that the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases."). In this case, the Court must look to the entire phrase "municipal water supply purposes" which has no dictionary definition. In the absence of a definition for the entire phrase, Plaintiffs focus solely on one word in the phrase and attempt to divine the meaning of the entire phrase through the definition of that one word.[9] The Court should reject Plaintiffs' mechanical approach. While each of the individual terms may have accepted definitions, it is the combination of words that creates ambiguity. Thus, even if the adjective "municipal" has the strict meaning Plaintiffs ascribe to it, the Court cannot ignore the rest of the words in the phrase when seeking to understand the meaning of the entire phrase. The Court should reject Plaintiffs' suggestion that municipal water supply purposes is clear and limited solely to municipalities.[10]

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[9] Contrary to Plaintiffs' suggestion, WWUC never conceded that the only ambiguous term is "municipal" or that "water supply purposes" is clear on its face. Rather, WWUC has consistently taken the position that the entire phrase "municipal water supply purposes" is ambiguous. If anything, as indicated above, the plain meaning of the entire phrase, municipal water supply purposes suggests that the broader meaning was the logical interpretation of the phrase prior to the adoption of the MWL. Indeed, the use of the word "purposes" deemphasizes the significance of the legal form of the entity and emphasizes the function served. In this light, the Definitions in the MWL merely affirm and underscore the logical interpretation of a phrase that was originally intended to have broad application to water systems based on the function they serve rather than their legal structure.

[10] As demonstrated by statutes from other states using comparable terms, Washington is not alone in distinguishing between the nature of the entity providing the service and the function of the service. Idaho's statute clearly defines "municipal purposes" more broadly than "municipality" to include public water supply by corporations and associations. Idaho Code § 42-202B (2006), a copy of which is attached in Appendix A. Utah's statute provides an exemption from relinquishment for nonuse to an "entity that supplies water as a utility service," which is defined to include, e.g., a municipality, regulated water companies, and "any other owner of a community water system." Utah Code Ann. § 73-1-4 (2006), a copy of which is attached in Appendix A. The Utah statute was amended last month, but keeps a broad definition of public water supplier. Arizona's statutes define both "municipal provider" and "municipal use" to include private water companies. Arizona A.R.S. § 45-561, a copy of which is attached in Appendix A. In all of these cases, state statutes grant special privileges to public water suppliers based on their purpose, not on their legal form of ownership. Thus, it is not without precedent to define and understand the phrase "municipal water supply purposes" more broadly than the definition of "municipality" or "municipal."

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Plaintiffs also try to divine a limited and clear meaning of the term municipal water supply purposes from the use of the term "municipality" in another chapter in the water code. Plaintiffs' argue that the use of the term "municipality" in RCW 90.03.260 implies that the term municipal water supply purposes as used in RCW 90.14.140 is limited to municipalities, but this is without merit. RCW 90.03.260 does not define the phrase "municipal water supply purposes." RCW 90.03.260 explains the contents of certain water right application, including applications for water rights for municipal water supply. Prior to the amendment of RCW 90.03.260 by the MWL, applications for water rights for municipal water supply were to include "the present population to be served, and, as near as may be, the future requirement of the municipality." The use of the term "municipality" in this context is neither a definition of municipality nor of municipal water supply purposes. Instead, it indicates that the water requirements of the municipality must be estimated by whatever entity is proposing to provide service. Community water needs are relevant to an application regardless of the legal form of the entity serving as the water utility.

Notably, while the MWL amended other portions of RCW 90.03.260, it did not meaningfully change or eliminate the phrase upon which Plaintiffs rely. If, as Plaintiffs suggest, the Legislature thought that the use of the term "municipality" in RCW 90.03.260 limited the definition of municipal water supply purposes in a way that is inconsistent with the newly adopted definition of municipal water supply purposes, it could have changed or deleted the reference in RCW 90.03.260. It did not. Plaintiffs' suggestion that the phrase "municipality" in RCW 90.03.260 limits the definition of the term "municipal water supply purposes" in RCW 90.14.140(2) is without merit.

Finally, another reason that the court cannot assume that the Legislature intended to limit the MWSP exemption only to cities and towns prior to the MWL is that the

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Legislature did not distinguish between the legal form of ownership of public water systems elsewhere in the Washington statutes. In other statutes the Legislature chose to regulate all public water systems equally regardless of the form of ownership. *See, e.g.*, RCW 70.116.030(3), which defines "public water system" as "any system providing water intended for, or used for, human consumption or other domestic uses," and RCW 70.119.020(8), which defines "public water system" as "any system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing piped water for human consumption …." Thus, the Legislature has not uniformly distinguished between public water systems owned by cities and towns and those owned by water district, public utility districts, cooperatives, associations and corporations. If the Legislature intended that the "claimed for municipal water supply purposes" exemption at RCW 90.14.140(2)(d) was to apply only to municipalities such as cities and towns it could or would have worded the exemption differently to focus on the identity of the supplier rather than the purpose for which the water was used or claimed. The plain language of the statute, and the Legislature's equal treatment of all public water systems regardless of ownership in other statutes, refutes plaintiffs' construction of the law prior to the MWSP definition in the MWL. As a result, plaintiffs' substantive and procedural due process claims relating to the definitions must fail as a matter of law.

IV. THE PLAINTIFFS' CLAIMS ARE BASED ON THEIR HYPERBOLIC CHARACTERIZATIONS OF THE CHALLENGED PROVISIONS OF THE MWL.

Just as Plaintiffs present subjective interpretations of the law as it existed prior to the MWL, Plaintiffs also mischaracterize the operation of the provisions of the MWL in an effort to further their arguments. As seen in the examples on the subsequent pages, Plaintiffs interpret provisions of the MWL in extreme and illogical ways, yielding absurd

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results. Their misinterpretations provide the foundation of their separation of powers and substantive due process challenges. The Court should reject Plaintiffs' plea to ignore reasonable interpretations. Instead, the Court should find the statute constitutional on the basis of reasonable interpretations.[11]

A. Plaintiffs Exaggerate the Meaning and Effect of the Pumps and Pipes Provision in a Manner Inconsistent with Its Plain Meaning.

As an essential basis of their separation of powers and substantive due process claims, Plaintiffs construe RCW 90.03.330(3), the "Pumps and Pipes Provision," as having broad effect, arguing that it automatically eliminates the beneficial use requirement and "converts unused water rights into vested, perfected rights." Plaintiff Tribes' Response at 25. Plaintiffs ask the Court to invalidate the Pumps and Pipes Provision on the basis of their hyperbole. The Court should reject Plaintiffs' claims.

The MWL indicates that pumps and pipes certificates are "rights in good standing." RCW 90.03.330(3). A plain reading of that section of the statute suggests an effect that is far from that ascribed to it by the Plaintiffs. As noted in WWUC's Response, the Legislature borrowed, almost verbatim, from the definition of inchoate rights cited in *Theodoratus*. *See Theodoratus*, 135 Wn.2d at 596 (an inchoate right is "an incomplete appropriative right *in good standing*") (quoting 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 226 (1971)) (emphasis added). Thus, the choice of the term "rights in good standing" reflects the inchoate nature of the rights, and does not, as Plaintiffs argue, automatically perfect those rights. The Pumps and Pipes Provision simply acknowledges that a water right documented by a pumps and pipes certificate

[11] Courts are required to adopt a constitutional interpretation of a challenged statute, wherever possible. *In re J.M.K.*, 155 Wn.2d 374, 387, 119 P.3d 840 (2005) ("If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute") (citing 2A Norman J. Singer, Statutes and Statutory Construction § 45.11, at 75 (6th ed. 2000).

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under RCW 90.03.330 (3) is valid and, in some cases, may include unperfected water appropriation fully available for use by the municipal water supplier. Specifically, the provision indicates that the as-yet-unused or inchoate portion remains unperfected until actual beneficial use occurs. Had it intended the effect Plaintiffs ascribe, the Legislature could have chosen more specific words indicating perfection. Instead, the Legislature chose language from the definition of inchoate rights to reflect their inchoate status.

References in the MWL to "existing" municipal "inchoate" rights support WWUC's interpretation of the operation of the Pumps and Pipes Provision. *See* RCW 90.03.386 (3)[12]; RCW 90.82.048[13]; RCW 90.54.191.[14] If, as Plaintiffs' claim, the Pumps and Pipes Provision resulted in the automatic perfection of inchoate portions of existing pumps and pipes certificates, there would have been no need to adopt these provisions addressing exercise of inchoate quantities of existing pumps and pipes certificates. The Court should not reach an interpretation that renders superfluous or unnecessary other provisions of the statute.

RCW 90.03.330(4) does not support Plaintiffs' assumption that the Pumps and Pipes Provision automatically converts unused water into perfected rights. Plaintiff Tribes' Response at 8. RCW 90.03.330(4) indicates that permits for municipal water

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[12] "In preparing its regular water system plan update, a municipal water supplier with one thousand or more service connections must describe:... (c) projected effects of delaying the use of *existing inchoate rights* over the next six years through the addition of further cost-effective water conservation measures before it may divert or withdraw *further amounts of its inchoate right for beneficial use*." RCW 90.03.386(3) (emphasis added).

[13] "The timelines and interim milestones in a detailed implementation plan... must address the planned future use of *existing water rights for municipal water supply purposes*, as defined in RCW 90.03.015, *that are inchoate*, including how these rights will be used to meet the projected future needs identified in the watershed plan, and how the use of these rights will be addressed when implementing instream flow strategies identified in the watershed plan." RCW 90.82.048 (emphasis added).

[14] "The department shall prioritize the expenditure of funds and other resources for programs related to stream flow restoration in watersheds where the exercise of *inchoate water rights* may have a larger effect on stream flows and other water uses." RCW 90.54.191(emphasis added).

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supply purposes issued after the adoption of the MWL must be perfected through beneficial use and certificates and not on the basis of system capacity. Plaintiffs suggest that, together, RCW 90.03.330(3) and (4), imply that the legislature "intended" two different methods of perfection, one for new municipal permits and one for existing municipal water right certificates. Plaintiffs' interpretation is without merit. While RCW 90.03.330(4) does not address certificates already issued on the basis of system capacity, it does not logically follow that RCW 90.03.330(3), the Pumps and Pipes Provision, necessarily establishes a different standard of perfection for those certificates. The two provisions, together, acknowledge *Theodoratus*. The Pumps and Pipes Provision simply clarifies that unused portions of existing pumps and pipes certificates are inchoate. RCW 90.03.330(4) affirms the Supreme Court's holding that Ecology must cease its administrative practice of issuing certificates on the basis of system capacity.

Finally, Plaintiff Tribes point to the final bill report and suggest the legislative history supports their interpretation of the Pumps and Pipes Provision. The legislative history on which Plaintiffs rely describes the effect of the bill and indicates that a previously issued pumps and pipes certificate "is declared to be a right in good standing." Plaintiff Tribes' Response at 9 (citing Goho Decl. Ex. U at 1). Plaintiffs argue that the use of the phrase "in good standing" in the bill report supports their interpretation of the identical phrase in the statute. The reliance on the identical phrase in the bill report is circular and tautological. It does not support Plaintiffs' strained interpretation. Accordingly, the Court must reject Plaintiffs' interpretation of the Pumps and Pipes Provision upon which their separation of powers and substantive due process claims depend.

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B. Plaintiffs Mischaracterize the Place of Use Provision as Retroactive.

Plaintiffs' arguments that the RCW 90.03.386(2), the "Place of Use Provision," violates the constitution is based on their interpretation that the statute is retroactive. As argued previously, the Place of Use Provision operates prospectively only because its application depends upon subsequent update of the water system plan that must incorporate water conservation measures. *See* WWUC's Response at 25. The update occurs after the adoption of the MWL and takes into consideration facts since the adoption of the MWL.

Despite the purely prospective nature of the provision, Plaintiffs claim that the provision is nevertheless retroactive because the place of use is no longer based on the facts and circumstances that existed at the time the right was established. Plaintiff Tribes' Response at 31. With their argument, Plaintiffs stretch the concept of retroactivity to an illogical and absurd extreme. As indicated previously, a statute is prospective when its precipitating event occurs after the adoption of the act. In this case, the entire operation of the Place of Use Provision occurs after the adoption of the MWL; the precipitating event for its application (DOH approval) occurs after the date of the adoption of the MWL, and the facts and issues that DOH considers in reaching its conclusion occur after the adoption of the Act.

Under Plaintiffs' interpretation of retroactivity as it applies to the Place of Use Provision, several existing and valid statutes in the water code would be retroactive and violate substantive due process, including the amendments to provisions allowing change of water rights (*see* RCW 90.03.380 and RCW 90.44.100) and the relinquishment statute (*see* ch. 90.14 RCW). In both these examples, the newer statutes apply to water rights that were issued prior to the adoption of the statutes. According to Plaintiffs' logic, these statutes would constitute retroactive legislation simply because they alter the legal status

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of water rights that were issued prior to the adoption of the statutes such that the water rights are no longer based solely on the facts and circumstances that existed at the time the rights were established. The Court must reject Plaintiffs' absurd retroactive characterization of the Place of Use provisions.

C. Plaintiffs Misconstrue the Purpose and Effect of the Connection and Population Provisions.

The Plaintiffs' arguments that RCW 90.03.260(4) and (5), the "Connection and Population Provisions," violate substantive and procedural due process misconstrue the statutory purpose and effect of this section and its relationship to RCW 90.03.290, the section that defines and limits Ecology's authority to grant water right applications and issue permits for new appropriations. WWUC's Response to Plaintiffs' Motions, at pp. 29-34, explains the different purposes of these sections and refutes plaintiffs' arguments that the "intent" of an application filed under the Water Code constitutes a limit on the scope of any subsequently issued permit.

Plaintiff Tribes acknowledged in their Response brief, at 39, the lack of a statute imposing maximum population or service connection limits, but nevertheless argue that the lack of a statute imposing this limitation is not dispositive. They urge the court to divine a subjective intention-based limitation under the common law. Such an approach would ignore the fact that the statute-based Water Code (codified at chapter 90.03 RCW) replaced the common law with respect to the creation of new water rights in Washington. The Water Code clearly pre-empted the common law prior appropriation and riparian doctrines (with the exception of rights then in existence) by establishing an application based system for new water rights. RCW 90.03.020, adopted in 1917, provides in pertinent part, "Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by

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appropriation for a beneficial use and in the manner provided and not otherwise." (emphasis added.)

Under RCW 90.03.290(3), Ecology is required to make written findings of fact concerning its investigation of an application, "and if it shall find that there is water available for appropriation for a beneficial use, and the appropriation thereof as proposed in the application will not impair existing rights or be detrimental to the public welfare, it shall issue a permit stating the amount of water to which the applicant shall be entitled and the beneficial use or uses to which it may be applied." The limitation provided by the statute is the amount of water, not the population or number of service connections that can be served by that quantity. Accordingly, the Court must reject Plaintiffs' claims.

V. PLAINTIFFS' INERPRETATION OF DISCRETE PROVISIONS IGNORES THE STATUTE AS A WHOLE.

Plaintiffs' overall approach of statutory construction further distorts their interpretation of the challenged provisions of the MWL. When interpreting the meaning and characterizing the impact of the isolated statutory provisions Plaintiffs ignore the statute as a whole. Plaintiffs' approach is inconsistent with principles of statutory construction:

> The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose... This is done *by considering the statute as a whole, giving effect to all that the legislature has said*, and by using related statutes to help identify the legislative intent embodied in the provision in question.[15]

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[15] *In re Parentage of J.M.K and D.R.K., Brock v. Kepl,* 155 Wn.2d 374, 387, 119 P.3d 840 (2005), emphasis added, citing *Dep't. of Ecology v. Campbell & Gwinn,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (When construing provisions of water code exempting from permit requirements certain domestic wells, Court clarifies principles of statutory construction). *See also Burns v. City of Seattle,* 161 Wn.2d 129, 146, 164 P.3d 475 (2007) ("The meaning of words in a statute is not gleaned from those words alone but from all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute one way or another.")

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As a result of Plaintiffs' approach, Plaintiffs mischaracterize the impact of the challenged provisions by not considering the effect of the MWL in its entirety. The Court must, instead, look to the entirety of the MWL in determining its meaning, measuring its alleged impact, and weighing its constitutionality.

The MWL represents the Legislature's balance between two related issues: (1) the water needs of a growing population; and (2) the limitations of a scarce water resource. The provisions of the MWL work together to comprehensively address both issues by facilitating the capacity of municipal water suppliers to serve growing population while simultaneously requiring those municipal water suppliers to adopt conservation and efficiency measures.

First, the legislature facilitated the capacity of municipal water suppliers to meet the water supply demands of the growing population. Municipal water suppliers provide water service to most of the state's population and face the brunt of the demands of the state's growing population. As described in WWUC's Motion and accompanying declarations, the capacity of municipal water suppliers to respond to the dynamic needs of a growing population were hindered by ambiguities in provisions of the water code applicable to public water systems, the resulting inconsistent implementation of the ambiguous provisions, and uncertainty in the validity of public water systems' water rights. WWUC's Motion at 4-14. With the MWL, the Legislature sought to enable the capacity of municipal water suppliers to serve a growing population by resolving the ambiguities and uncertainties in the administration of municipal water rights and providing municipal water suppliers with the certainty and flexibility they need to provide water service to growth areas and expanding populations. WWUC's Motion at 14-16.

In several sections of the MWL, the Legislature simultaneously adopted measures to address the limitations of the water supply. *See* Section 7(1) of the MWL, codified at

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RCW 70.119A.180(1) ("[i]t is the intent of the legislature that the department [of health] establish water use efficiency requirements designed to ensure efficient use of water while maintaining water system financial viability, improving affordability of supplies, and enhancing system reliability.") Specifically, the Legislature required municipal water suppliers to adopt water conservation measures and the Department of Health ("DOH") to adopt applicable regulations and standards. For example:

- Municipal Water Suppliers must adopt water conservation measures as part of its water system plan and integrate its conservation efforts with water system operation and management. RCW 90.03.386(3); RCW 70.119A.180(4)(a). They must also adopt a schedule for implementing the conservation program. RCW 70.119.180(4)(c)(ii)
- Municipal Water Suppliers must comply with water distribution leakage standards adopted by Health that ensure that they are reducing water system leakage rates or are maintaining water distribution systems in a condition consistent with leakage rates adopted by Health. RCW 70.119.180(4)(b).
- Municipal Water Suppliers must adopt (in an open public forum) water conservation goals. RCW 70.119.180(4)(c)(i). They must also adopt schedules for achieving their conservation goals and a reporting system for regular reviews of their progress toward their goals. RCW 70.119.180(4)(c)(ii), (iii). In the event that a system does not meet its goals, it must develop a plan for modifying its program. RCW 70.119.180(4)(c)(iv)
- Department of Health facilitates the conservation efforts of Municipal Water Suppliers by adopting regulations that identify how to appropriately fund and implement conservation activities. RCW 70.119.180(4)(a).
- The MWL facilitates environmental efforts of Municipal Water Suppliers by expanding the types of uses considered to be "beneficial uses" to include uses "that benefit fish and wildlife, water quality or other instream resources" and "uses that are needed to implement environmental obligations" under water shed plans, habitat conservation plans, hydropower licenses, or comprehensive irrigation district management plans.[16] RCW 90.03.550.

[16] Notably, Plaintiffs' do not challenge this provision, despite the fact that it changes the type of activity that is considered a "beneficial" use for municipal water suppliers. Had the Plaintiffs' been intellectually honest, they would have included this provision in their attack. Their failure to challenge the provision indicates their result-oriented approach.

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Plaintiffs fail to consider any of these provisions in their appeal. When the statute is viewed in its entirety, including the provisions designed to promote conservation and efficiency, the MWL cannot give rise to the facial harm plaintiffs allege and further emphasizes the highly speculative nature of their allegations.[17]

For example, Plaintiffs point to various provisions of the MWL that provide flexibility to municipal water suppliers, including the Place of Use Provision and Provisions Regarding Connection and Population Figures, and argue that the provisions will necessarily result in increased consumption of water. In alleging harm of greater consumption by larger populations in a larger service area, Plaintiffs completely ignore the MWL's simultaneous requirements for conservation and efficiency which reduce the overall consumption of water.[18] Indeed, with increased conservation and efficiency measures, consumption of water can decrease even as number of connections and service area grow. *See, e.g.*, Declaration of John Kirner dated Jan. 30, 2008 at 19 ¶42 ("Tacoma has experienced a relative decline in overall water usage due to conservation such that the average day water use in 2005 was lower than in 1995, despite an increase of customer connections of 18 percent"). Because the overall use of water is more efficient, changes in water system boundaries and additional connections does not equate to increased consumption.

Similarly, Plaintiffs also point to the Pumps and Pipes provision and argue that the capacity to grow into inchoate quantities will necessarily result in greater use of water by

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[17] WWUC has thoroughly addressed the highly speculative and dubious nature of Plaintiffs' alleged harm in WWUC's Response and accompanying declarations. We do not repeat those arguments here.

[18] As described in WWUC's Response, Plaintiffs fundamentally ignore the role of quantity limitations of water rights that limit the usage of water regardless of the flexibility of other attributes of a water right. Nothing in the MWL allows municipal water suppliers to serve in excess of the limitations on instantaneous and annual water quantities of their water rights, which refutes Plaintiffs' claim that the MWL has expanded municipal water rights.

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municipal water suppliers. *See* Burlingame Plaintiffs' Motion at 7-8. Setting aside the legal problems with their argument, Plaintiffs' unproven factual contentions ignore the conservation and efficiency provisions of the MWL, according to which overall use of water by municipal water suppliers can diminish, despite population growth. Significantly, Plaintiffs ignore the provision of the MWL by which certain municipal water suppliers must evaluate as part of their water system plan updates, the "projected effects of delaying the use of existing inchoate rights… through the addition of further cost-effective water conservation measures before it may divert or withdraw further amounts of its inchoate right for beneficial use." RCW 90.03.386(3). This section encourages the implementation of additional conservation measures prior to use of additional inchoate quantities.

The Court should therefore reject Plaintiffs' speculative allegations of harm, in part because they interpret provisions of the MWL out of context and ignore conservation and efficiency requirements the statute imposes.

VI. THE PUMPS AND PIPES PROVISION DOES NOT RESULT IN THE LEGISLATIVE DETERMINATION OF ADJUDICATIVE FACTS.

For the first time in their response briefs, Plaintiffs argue that the Pumps and Pipes Provision violates separation of powers because it results in legislative determination of adjudicative facts. Plaintiffs' argument is fundamentally based on Plaintiffs' misinterpretation of the Pumps and Pipes Provision discussed in Section IV(A). Because the provision does not have the effect that Plaintiffs ascribe to it, their argument fails. The Pumps and Pipes Provision does not result in automatic perfection and therefore all of the factual determinations required to establish perfection are yet to be made. For example, inchoate rights in good standing must demonstrate reasonable diligence. *See* Hutchins at 374. The question of whether a water right holder exercises reasonable diligence is one of

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fact that "depends on the facts and circumstances of each particular case" and "necessarily varies with each individual case." *Id.* The Pumps and Pipes provision does not reach a determination that any unused pumps and pipes certificate or portion of a pumps and pipes certificate has met reasonable diligence requirements or been beneficially used. Accordingly, the Plaintiffs' argument that the provision results in the legislative determination of adjudicative facts fails.

VII. STANDARD OF REVIEW.

A. Courts Disfavor Facial Challenges and Require that Plaintiffs Satisfy Several Exacting Legal Standards of Review, Including the No Set of Circumstances Test.

Plaintiffs ask this court for extraordinary relief. In a facial challenge, Plaintiffs seek the invalidation of the statute in all applications so as to render it utterly inoperable. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000). As recently described by the United States Supreme Court, courts disfavor facial challenges:

> Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.

Washington State Grange v. Wash. State Republican Party, 128 S.Ct. 1184, 1191 (2008) (internal quotations and citations omitted). The Court indicates that "[e]xercising judicial restraint in a facial challenge frees the Court not only from unnecessary pronouncement

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on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy…". *Id.*

Based on the extreme nature of the relief requested and the general disfavor of facial claims, courts impose several hurdles on Plaintiffs arguing facial constitutional challenges. These hurdles are reflected in searching standards of review on facial challenges and rules of statutory construction. Statutes are "presumed constitutional." *Washington Federation of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995) (declaratory judgment action). Their unconstitutionality must be proved beyond a reasonable doubt. *Id.* A "facial challenge must fail where the statute has a 'plainly legitimate sweep.'" *Wash. State Grange*, 128 S.Ct. at 1190. Wherever possible, "it is the duty of this court to construe a statute so as to uphold its constitutionality." *State v. Browet*, 103 Wn.2d 215, 219, 691 P.2d 571 (1984). Among these various hurdles, the Courts also require that plaintiffs "must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095 (1987). S*ee also*, *Wash. State Grange*, 128 S.Ct. at 1190. *Salerno's* well-established "no set of circumstances" test is just one of several hurdles reflecting the disfavor of constitutional challenges. It reflects the principle that the Court should not lightly grant the relief requested.

B. *Salerno* is well established as the appropriate standard of review in facial challenges under Washington law

Despite the fact that Washington state courts regularly apply the no set of circumstances test when reviewing facial challenges, Burlingame Plaintiffs argue that a less stringent standard of review applies. Plaintiffs propose to carve out of *Salerno* a "taxpayer standing" exception.

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Plaintiffs' argument is based on *Robinson v. City of Seattle,* 102 Wn. App. 795, 10 P.3d 452 (2000), which explicitly rejected *Salerno's* "no set of circumstances" test as "inappropriate for a taxpayer challenge under the state constitution." *Id.* at 808. However, as noted by the State, *Robinson* is an anomaly and an outlying case with a questionable foundation that stands in contrast to well-established case law governing facial challenges. *Robinson's* plainly erroneous suggestion that the *Salerno* test had only been referred to twice in Washington cases undermines its reasoning, and thus its instructive value.

Robinson's review of Washington State case law on the application of *Salerno* in facial challenges is, at best, incomplete. *Robinson* notes that it could "find only two references to the *Salerno* 'no set of circumstances' test [applied in Washington courts]". 102 Wn. App. at 808 n.24.[19] That statement indicates that *Robinson* apparently overlooked cases where Washington courts had applied the *Salerno* framework to a facial challenge but did so without using the word "Salerno." In fact, prior to the opinion in *Robinson*, at least three additional cases—including two from the Washington Supreme Court—subjected facial challenges to the *Salerno* standard of review.[20]

Furthermore, as the State points out, *Salerno's* "no set of circumstances" standard has been regularly applied to facial challenges since *Robinson*. *See* II.A.1 of State's

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[19] The two cases *Robinson* was able to find were *In re Detention of Campbell*, 139 Wn.2d 341, 364, 986 P.2d 771(1999) (Sanders, J., dissenting) (generally recognizing *Salerno* test in facial challenges), and *State v. Nelson*, 81 Wn. App. 249, 256, 914 P.2d 97 (1996) (*Salerno* cited only for the proposition that "[t]he State has an interest in punishment.").

[20] *See Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 221, 5 P.3d 691 (2000) ("A facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." (emphasis in original)); *In re Detention of Turay*, 139 Wn.2d 379,417 n.27, 986 P.2d 790 (1999) ("Our traditional rule has been ... that a facial challenge must be rejected unless there exists *no set of circumstances* in which the statute can constitutionally be applied." (emphasis in original)); *State v. Hunter*, 102 Wn. App. 630, 638 n.4, 9 P.3d 872 (2000) (Division 1 "interpreted [Plaintiff's] remaining due process arguments as going to a facial challenge because his implication is that under *no set of circumstances* could application of the statute in its current state be found sufficiently definite to be constitutional" (emphasis added)).

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Burlingame Reply. Even more recently, the Washington Supreme Court employed the *Salerno* framework in a facial challenge to the State's perjury statute. *State v. Abrams*, __ Wn.2d __, 178 P.3d 1021 (Wash. 2008) (decided Mar. 20, 2008). The court found the statue unconstitutional because the statute's language was directly at odds with U.S. Supreme Court precedent. The *Abrams* court determined that, in view of such precedent, there was "*no set of circumstances* under which a judge can constitutionally apply [such] a statute." *Id.* at 1025 (emphasis added) (upon finding the offending language to be functionally separate from the rest of the statute, the court proceeded to sever it out).

Other than *Robinson*, the Burlingame Plaintiffs only cite two Washington cases to anchor their contention that facial challenges brought pursuant to taxpayer standing require a unique and less rigorous standard of review than other facial challenges: *Farris v. Munro* 99 Wn.2d 326, 662 P.2d 821 (1983) and *State ex rel. Tattersall v. Yelle* 52 Wn.2d 856, 329 P.2d 341 (1958). These cases do not support Plaintiffs' position. First, *Farris* is not, in the final analysis, a taxpayer standing case. In fact, the *Farris* court actually rejected the plaintiff's request to find taxpayer standing, noting that "petitioner failed to make a request upon the Attorney General to bring suit, and does not allege any facts indicating that such a request would have been useless." *Farris,* 99 Wn.2d at 329 (1983). While the court considered the underlying merits of the case, because the issue presented amounted to one of "serious public importance," the case is irrelevant to the standard of review to be applied in a taxpayer case. Second, in *Tattersall*, although the court found that taxpayer standing was appropriate, the court did not opine on the standard of review because the case was decided largely on technical and procedural grounds. 52 Wn.2d at 862 (1958).[21] Finally, contrary to Plaintiffs' assertion that these two cases

[21] Indeed, both the *Tattersall* majority and concurrence concluded that the case was fraught with justiciablity issues. *See* 52 Wn.2d at 862 (majority) (recognizing that the appellant's mere "averment of inadequate standards ... do[es] not raise a justiciable issue."); *id.* at 868 (concurrence) ("The absence of a justiciable

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demonstrate a *Salerno*-free loophole for taxpayer standing cases, Burlingame. Resp. at 5, the U.S. Supreme Court only announced the *Salerno* standard in 1987—four years after *Farris* and 29 years after *Tattersall*.

Accordingly, Plaintiffs' reliance on *Robinson* is misplaced. The "no set of circumstances" test is applicable to facial constitutional challenges and should be applied in this case.

VIII. CONCLUSION.

For the foregoing reasons, the Court should grant WWUC's Motion and deny Plaintiffs' Motions. The Court must deny the extraordinary relief Plaintiffs request because Plaintiffs claims are purely speculative and based on misinterpretations of current and past law.

DATED this 24th day of April, 2008.

GORDONDERR LLP

By _____
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issue is determinative of this case. The motion to dismiss was well taken. We should not reach the merits of this case.") The court's clear recognition of justiciablity concerns would have precluded any examination of the standard of review, and thus *Tattersall* provides no support for the Burlingame Plaintiffs' assertion that a taxpayer standing exception to searching review of facial challenges has "been the law of the state for decades." Burlingame Resp. at 5-6.

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Appendix A

Arizona A.R.S. § 45-561 provides the following definition:

(10) "Municipal provider" means a city, town, private water company or irrigation district that supplies water for non-irrigation use.

(11) "Municipal use" means all non-irrigation uses of water supplied by a city, town, private water company or irrigation district, except for uses of water, other than Colorado river water, released for beneficial use from storage, diversion or distribution facilities to avoid spilling that would otherwise occur due to uncontrolled surface water inflows that exceed facility capacity.

Idaho Code § 42-202B (2006) provides the following definition:

Whenever used in this title, the term:

(4) "Municipality" means a city incorporated under section 50-102, Idaho Code, a county, or the state of Idaho acting through a department or institution.

(5) "Municipal provider" means:

(a) A municipality that provides water for municipal purposes to its residents and other users within its service area;

(b) Any corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area; or

(c) A corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a "public water supply" as described in section 39-103(12), Idaho Code.

(6) "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider.

Idaho Code § 39-103 (2006), provides the following definition:

(12) "Public water supply" means all mains, pipes and structures through which water is obtained and distributed to the public, including wells and well structures, intakes and cribs, pumping stations, treatment plants, reservoirs, storage tanks and appurtenances, collectively or severally, actually used or intended for use for the purpose of furnishing water for drinking or general domestic use in incorporated municipalities; or unincorporated communities where ten (10) or more separate premises or households are being served or intended to be served; or any other supply which serves water to the public and which the department declares to have potential health significance.

Utah Code Ann. § 73-1-4 (2006) provides the following definition:

(2) As used in this section, "public water supply entity" means an entity that supplies water as a utility service or for irrigation purposes and is also:

(a) a municipality, water conservancy district, metropolitan water district, irrigation district created under Section 17A-2-701.5, or other public agency;

(b) a water company regulated by the Public Service Commission; or

(c) any other owner of a community water system.

[A "public water supply entity" can apply for an extension and be exempt from forfeiture for non-use under Utah Code Ann. § 73-1-4.]

Appendix A

Utah 2008 Session Laws 57th Legislature, 2008 General Session, Ch. 380 amending Utah Code Ann. § 73-1-4:

(1) As used in this section:

(a) "Public entity" means:

(i) the United States;

(ii) an agency of the United States;

(iii) the state;

(iv) a state agency;

(v) a political subdivision of the state; or

(vi) an agency of a political subdivision of the state.

(b) "Public water supplier" means an entity that:

(i) supplies water, directly or indirectly, to the public for municipal, domestic, or industrial use; and

(ii) is:

(A) a public entity;

(B) a water corporation, as defined in Section 54-2-1, that is regulated by the Public Service Commission;

(C) a community water system:

(I) that:

(Aa) supplies water to at least 100 service connections used by year-round residents; or

(Bb) regularly serves at least 200 year-round residents; and

(II) whose voting members:

(Aa) own a share in the community water system;

(Bb) receive water from the community water system in proportion to the member's share in the community water system; and

(Cc) pay the rate set by the community water system based on the water the member receives; or

(D) a water users association:

(I) in which one or more public entities own at least 70% of the outstanding shares; and

(II) that is a local sponsor of a water project constructed by the United States Bureau of Reclamation.

(c) "Shareholder" is as defined in Section 73-3-3.5.

(d) "Water company" is as defined in Section 73-3-3.5.

(e) "Water supply entity" means an entity that supplies water as a utility service or for irrigation purposes and is also:

(i) a municipality, water conservancy district, metropolitan water district, irrigation district, or other public agency;

(ii) a water company regulated by the Public Service Commission; or

(iii) any other owner of a community water system.